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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MEDFORD DIVISION

WATERWATCH OF OREGON,

Case No.

Plaintiff,

v.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Q BAR X RANCH, JACQUELINE M.
DOHERTY, MARY L. ANDRADE, JANINE M.
PFOHL, and WILLIAM T. PFOHL,

Defendants.

INTRODUCTION

1. This citizen suit, brought under the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), seeks to enjoin the Defendants to implement measures to eliminate “take” of Southern

Oregon/Northern California Coast Coho Salmon (“Southern Oregon Coast Coho”) at Pomeroy Dam and its associated water diversion system on the Illinois River in Oregon.

2. Pomeroy Dam (the “Dam”) and its associated water diversion system is owned, operated, and/or controlled by each of the Defendants, jointly and singly.

3. The Pomeroy Dam and its associated water diversion system on the Illinois River is causing “take” of Southern Oregon Coast Coho, which are listed as threatened under the ESA, in violation of Sections 4(d) and 9 of the ESA. 16 U.S.C. § 1533(d) & 1538(a)(1)(B). The Dam is causing take of Southern Oregon Coast Coho by among other things: blocking or impeding adult salmon migration and access to spawning and rearing habitat; harming or killing adult salmon in their efforts to traverse the Dam to migrate or spawn; causing conditions that raise temperatures in the stream to levels that stress and/or injure, and/or kill Southern Oregon Coast Coho; causing conditions that pool and slow down the river upstream of the Dam that increase predation of juvenile Southern Oregon Coast Coho; and unscreened and/or inadequate screening of water diversions from the Dam, causing salmon to be stranded and be injured or die in irrigation canals and ditches.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g).

5. As required by 16 U.S.C. § 1540(g)(2)(A)(i), plaintiff WaterWatch of Oregon provided the Defendants with notice of the violations described in this complaint by letter dated January 11, 2022 (with an amended carbon copy list of recipients on January 12, 2022). Plaintiff sent both notices to Defendants by regular first class and by certified U.S. mail, return receipt requested. Plaintiff also provided a copy of each notice to the Secretary of Commerce, to the National Oceanic and Atmospheric Association, and to the Oregon Department of Fish and

Wildlife. Plaintiff also provided a copy of the notice to the U.S. Attorney's Office and the Department of Homeland Security. More than 60 days have passed since Defendants received both the original and amended notice and no Defendant has responded to the notice.

6. Venue in this District and Division is proper under 16 U.S.C. § 1540(g)(3)(A), 28 U.S.C. § 1391, and Local Rule 3-2(a)(3), because the Illinois River and Pomeroy Dam are located in Josephine County, Oregon.

PARTIES

7. WaterWatch of Oregon ("WaterWatch") is a non-profit conservation organization dedicated, since 1985, to the protection and restoration of streamflows in Oregon's rivers and streams in order to sustain native fish, wildlife, and aquatic ecosystems as well as the people and communities who depend on healthy rivers. WaterWatch is incorporated and has its headquarters in the State of Oregon. WaterWatch has worked for over 35 years in river basins around the State of Oregon to restore salmon and stream flows, including work to remove significant fish passage barriers such as dams. A number of those dams have been in the Rogue River and tributaries of the Rogue River. WaterWatch has been instrumental in dam removal and flow improvement throughout the State, using voluntary agreements, education, and where necessary, litigation in order to protect rivers, their tributaries, and fish. WaterWatch funds at least one staff member almost full time and funds other staff members part time, to work on matters related to dams and other fish passage barriers in the State of Oregon. Dam and barrier removal is an integral part of WaterWatch's overall work as an organization.

8. The Illinois River is a federally designated wild and scenic river and is, in turn, a major tributary to the wild and scenic Rogue River. The Illinois and Rogue are both important salmon rivers. There are 100 miles of high-quality spawning and rearing habitat above the

Pomeroy Dam. Southern Oregon Coast Coho, listed as threatened under the ESA, are present in the Illinois River.

9. WaterWatch has approximately 1,000 members in Oregon. WaterWatch members participate in recreational activities such as hiking, backpacking, fishing, wildlife-viewing, and river and lake boating and kayaking throughout Oregon, including in and along the Illinois and Rogue Rivers. More specifically, WaterWatch members fish and boat in the Rogue River and some of its tributaries. Members fish for all types of salmon as well as steelhead. Fishing has been and is negatively affected by threats to salmon including to Southern Oregon Coast Coho, especially since the Southern Oregon Coast Coho have been listed as threatened. WaterWatch has standing based upon injuries to its members' interests caused by the Pomeroy Dam's impacts on salmon.

10. Defendants Jacqueline Doherty, Mary Andrade, Janine Pfohl, and William Pfohl (collectively the "Individual Defendants") are individual residents of the State of Oregon with an address of 900 West Side Road, Kerby, Oregon, and they are owners and operators of the Pomeroy Dam and some, or all, are principals of Defendant Q Bar X Ranch.

11. Q Bar X Ranch is the business entity owner of Pomeroy Dam and/or operated by the Individual Defendants. Q Bar X Ranch is licensed and registered under the laws of the State of Oregon with a principal place of business address of 900 West Side Road, Kerby, Oregon and an authorized representative mailing address of P.O. Box 3210, Kerby, Oregon.

BACKGROUND

12. Southern Oregon Coast Coho Salmon are listed as a threatened species under the Endangered Species Act. 50 C.F.R. § 223.102. Southern Oregon Coast Coho were first proposed for listing in July of 1995, 60 Fed. Reg. 38,011 (July 25, 1995), and first listed as

threatened in May of 1997. 62 Fed. Reg. 24,588 (May 6, 1997). The listing was reaffirmed in June of 2005. 70 Fed. Reg. 37,160 (June 28, 2005).

13. Southern Oregon Coast Coho populations have overall declined precipitously over the past several decades. Habitat degradation, including blocked or decreased access to habitat and blocked or decreased ability to migrate to and from spawning grounds in tributary streams due to man-made or man-caused obstacles, has been a major factor in the decline. In proposing to list Southern Oregon Coast Coho as threatened under the ESA, the National Marine Fisheries Services (“NMFS”) found that dams and the effects associated with dams such as sedimentation, loss of habitat connectivity, impairment of juvenile and adult migration, injury during migration, impairment of juvenile rearing, and increased stream temperatures were all factors contributing to the decline and supporting the listing of Southern Oregon Coast Coho as threatened.

14. In its 2014 Final Recovery Plan for Southern Oregon Coast Coho, NMFS identifies barriers such as dams as having a highly negative impact on Southern Oregon Coast Coho recovery.

15. The Illinois River is a federally-designated wild and scenic river and a tributary to the also federally-designated wild and scenic Rogue River. Most of the Illinois River lies in National Forests, including its headwaters above the Pomeroy Dam. The Illinois River is a popular fishing and recreation river and an important river of Southern Oregon Coast Coho.

16. Areas of the Illinois River above the Pomeroy Dam and its reservoir are prime salmon habitat, with up to 100 miles of high-quality spawning and rearing habitat above the Dam.

17. The Illinois River is critical habitat for Southern Oregon Coast Coho, including the river surrounding Pomeroy Dam. 64 Fed. Reg. 24,062 (May 5, 1999).

18. Pomeroy Dam is located at approximately river mile 56, near West Side Road on the Illinois River. Pomeroy Dam is an approximately 7 feet tall concrete structure whose sole function is to divert water into a canal system for irrigation purposes. Pomeroy Dam completely spans the Illinois River and it has no fish passage.

19. Pomeroy Dam is operated to divert water into canals and ditches located on Q Bar X Ranch.

20. Pomeroy Dam's diversion function could be replaced by modern fish-friendly methods of diverting water to canals and ditches located on Q Bar X Ranch.

21. The Pomeroy Dam is a passage impediment and hazard for migrating adult and juvenile Southern Oregon Coast Coho on the Illinois River. The passage impediment and Dam hazards impede migration and spawning as well as causing direct harm to Southern Oregon Cost Coho.

22. The Pomeroy Dam also harms Southern Oregon Coast Coho by creating stream conditions that cause increased temperatures.

23. High stream temperatures stress and harm, and if high enough, can kill Southern Oregon Coast Coho.

24. The Pomeroy Dam also harms Southern Oregon Coast Coho by creating pool conditions that lead to increased predation on juvenile outmigrating salmon.

25. Defendants' operation of Pomeroy Dam and its associated water diversion infrastructure, including the attendant series of water diversions, inadequately screened, poorly designed and/or poorly maintained canals and/or ditches, and return flows, is falsely attracting,

injuring, diverting, and stranding Southern Oregon Coast Coho, causing harm to Southern Oregon Coast Coho.

26. The Pomeroy Dam does not meet the criteria, rationale, and guidelines for design of adequate safe, timely, and efficient fish passage published by NMFS and as set forth in Oregon Department of Fish and Wildlife (“ODFW”) Oregon Administrative Rules (OAR), Section 635-412-005 *et seq.*, particularly OAR 635-412-0035.

27. Due to this harmful impact, in 2019, the most recent update of the Statewide Fish Passage Priority List, ODFW listed Pomeroy Dam as the highest priority for fish passage correction among privately-owned dams in Oregon (Group 1).

28. Oregon’s fish passage statutes, ORS 509.585(2) and ORS 509.610(3), require that Defendants remove or provide adequate fish passage over Pomeroy Dam.

29. The problems with Pomeroy Dam that harm, injure, and kill fish are continuing in nature, with WaterWatch having observed the conditions described as recently as April of 2022.

30. Over the course of the preceding several years, WaterWatch has attempted to engage Defendants to reach a voluntary agreement to remove Pomeroy Dam. Specifically, WaterWatch has requested a voluntary agreement by Defendants to allow WaterWatch to engage funding and contractors to remove the Pomeroy Dam and provide adequate and safe replacement for the Dam’s diversion function, at no cost to Defendants.

31. WaterWatch has extensive experience with obtaining funding and working with expert contractors on dam removal throughout Oregon.

32. WaterWatch’s experience with reaching out to Defendants causes WaterWatch to be concerned that Defendants will refuse and fail to respond to this Complaint and/or to any order of this Court to remove or fix the Pomeroy Dam.

CAUSE OF ACTION

Take Of ESA-Listed Species

33. WaterWatch restates and realleges all preceding paragraphs.

34. The ESA prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

35. By regulation, NMFS has defined “harm” to include:

Significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102. “Harassment” includes unintentional acts that make it more difficult for an endangered species to breed, feed, shelter, reproduce or raise its offspring. H.R. Rep. No. 412, 93rd Cong. 1st Sess. At 11 (1973); 50 C.F.R. § 17.3.

36. NMFS has also determined that its definition of “harm” is consistent with the definition of “harm” in regulations promulgated by the U.S. Fish and Wildlife Service which definition includes failure to act where a person has a duty to do so in order to avoid or prevent the harm.

37. Under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), NMFS has the authority to issue regulations extending the take prohibition to threatened species. NMFS has adopted a regulation pursuant to Section 4(d) making the take prohibition applicable to Southern Oregon Coast Coho. 50 C.F.R. § 223.203. Under 16 U.S.C. § 1538(a)(1)(G), it is unlawful to take threatened Southern Oregon Coast Coho in violation of the Section 4(d) regulation.

38. NMFS regulations define “harm” that is a take of listed species to include significant habitat modification or degradation which actually kills or injures fish or wildlife by

significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering. 50 C.F.R. § 222.102.

39. The ESA take prohibition applies to all “persons.” 16 U.S.C. § 1538(a)(1). The ESA defines a “person” to include an individual, corporation, partnership, trust, association or any other private entity. 16 U.S.C. § 1532(13). The defendant in this case is a “person” as defined by the ESA.

40. The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person who is alleged to be in violation of any provision of the ESA or regulations implementing the ESA. 16 U.S.C. § 1540(g).

41. Oregon’s fish passage statute requires that Defendant remove or provide adequate fish passage over Pomeroy Dam. *See* ORS 509.585(2) & ORS 509.610(3).

42. The Pomeroy Dam and its associated water diversion system is causing take of Southern Oregon Coast Salmon by one or more of the following:

- blocking and/or delaying adult salmon migration and access to spawning habitat;
- harming or killing adult Southern Oregon Coast Coho in their efforts to traverse the Dam to migrate or spawn;
- harming or killing juvenile salmon by blocking and/or delaying out-migration from spawning and rearing areas;
- harming or killing adult Southern Oregon Coast Coho by creating conditions that raise stream temperatures;
- harming or killing juvenile Southern Oregon Coast Coho by creating a reservoir pool that increases predation; and

- through the operation of the Pomeroy Dam and its attendant series of water diversions, poorly designed and/or maintained canals and/or ditches, and return flows, is falsely attracting, injuring, and stranding Southern Oregon Coast Coho.

43. Defendants, as the owners and operators of Pomeroy Dam and its associate water diversion system, have individually and together violated and continue to violate the take prohibitions in Section 9 of the ESA by failing to remove the Dam or provide adequate fish passage at the Dam and operate it and its associated water diversion system in a manner that avoids take, which failure has caused and continues to cause harm, harassment, injury and death to Southern Oregon Coast Coho.

44. Defendants' failure to either to remove Pomeroy Dam or provide adequate fish passage and safe operation of the Dam and its associated water diversion system is the proximate cause of unlawful take of Southern Oregon Coast Coho.

45. Defendants are liable for the unlawful take of Southern Oregon Coast Coho in the Illinois River and WaterWatch is entitled to an Order enjoining Defendants from continued take of Southern Oregon Coast Coho, requiring either removal of the Dam or provision of adequate fish passage with repairs to the Dam and associated diversion system adequate to end and prevent ongoing harm to fish.

46. WaterWatch is entitled to recovery of their attorney fees and litigation expenses for preparing and bringing this litigation, pursuant to 16 U.S.C. § 1540(g)(4).

REQUEST FOR RELIEF

WHEREFORE, plaintiffs request an order from this Court:

A. Declaring that Defendants have, individually and together, violated the salmon 4(d) rule, 50 C.F.R. § 223.203 and the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G), and

1538(1)(B) by failing to provide adequate fish passage and safe operation at the Pomeroy Dam and its associated water diversion system and/or by failing to remove the Pomeroy Dam;

B. Enjoining Defendants from continuing to maintain or operate the Pomeroy Dam and its associated water diversion system in a manner that violates section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G) and 1538(1)(B), because of Defendants' failure to provide adequate fish passage, and requiring Defendants to exercise due diligence in either removal of Pomeroy Dam or construction of adequate fish passage as defined by the most recent NMFS and ODFW criteria and the best commercially available fish passage science and engineering criteria with repairs to the Dam and the associated water diversion system adequate to end and prevent ongoing harm to fish, within the immediately next available in-water work window, as defined by ODFW and NMFS;

C. Ordering Defendants to report to the Court and WaterWatch on the progress of the work ordered in subpart B above, on the following schedule:

- Within 30 days of the Court's order, proof of retention of an engineer with experience and expertise in dam removal and fish passage;
- Within 90 days of the Court's order provide plan and a design from the engineer of the proposed work sufficient to commence project permitting;
- Within 180 days of the Court's order, in consultation with the engineer, secure a construction contractor with experience and expertise in dam removal and fish passage and provide copies of applications for all permits needed to implement the work;
- Report every 30 days thereafter on the progress of securing the necessary permits and progress of the work until it is completed;

- Within 360 days of the court order, complete removal of the Dam and modification and/or replacement of the Q Bar X diversion and canal system to protect Southern Oregon Coast Coho.

D. Should Defendants fail to timely comply with any requirement under subparts B and C above, ordering Defendants to allow WaterWatch and WaterWatch's employees, agents, and contractors access to the Pomeroy Dam, the associated diversion system, and Q Bar X Ranch property for the purposes of removing the Dam and eliminating harm caused by the diversion and canal system to protect Southern Oregon Coast Coho;

E. Awarding plaintiffs their costs and attorneys' fees pursuant to 16 U.S.C. § 1540(g)(4); and

F. Granting such other and further relief as the court deems just and equitable.

Respectfully submitted this 22nd day of June, 2022.



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